No. 4694.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,

Appellant,

vs.

Jasper Thomason,

Appellee.

REPLY BRIEF FOR APPELLANT.

WM. STORY, JR.,
JOSEPH L. LEWINSON,
LAURENCE W. BEILENSON,
Solicitors for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

No. 4694.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,

Appellant,

vs.

Jasper Thomason,

Appellee.

REPLY BRIEF FOR APPELLANT.

May It Please the Court:

Introductory Statement.

The positions taken in the brief for appellee were anticipated and dealt with in our opening brief. But, in his brief of 110 pages, appellee has advanced some arguments and cited a number of cases that we could not reasonably have answered in advance. Furthermore, by skilful selection of his materials, appellee has made assertions as statements of fact that are calculated to give the impression the cause in which

the orders appealed from were made, was a formal proceeding to foreclose a mortgage, and for an accounting in which he, the said appellee, was but a nominal party. By reading the returns of the marshal and the supporting affidavit of his deputy according to the most rigid rules for the construction of a common law pleading, and distorting one or two inadvertences and clerical misprisions into evidence of perjury, together with a liberal use of invective, appellee's learned counsel have undertaken to paint the officers of the law as black as Isis. Said counsel have also seen fit to make ridiculous and uncalled for insinuations about the counsel who conducted the trial of the cause for appellant. This use of "atmosphere" is manifestly designed to suggest that the injury done appellant by the order quashing the service of process on appellee after final decree following full hearing, and seven years of litigation, was merely technical in character, and that the orders appealed from are sufficiently supported by the purely formal and perfunctory showing adduced by appellee. This is a perversion of the record.

It is not altogether surprising to find counsel indulging themselves in this manner, as they appear to have found it hard to answer our arguments.

As the case stands, Thomason, the appellee, is beset with difficulties. In the first place, if it should be conceded that the service was on Thomason's daughter Rosamond, as claimed by Thomason, the service was good because at the time thereof Rosamond was an "adult person" within the meaning of Equity Rule

13. (A case expressly in point, which we failed to locate until a day or two ago, is *Evans v. Yost,* 255 Fed. *726,* decided by the Circuit Court of Appeals for the Eighth Circuit, and reviewed below.) To hold otherwise would give to the word "adult", used in the rule as an adjective, a meaning other than its generally accepted meaning; would give no meaning at all to the word "person" used in the rule in conjunction with the word "adult", and would ignore the purpose of the rule to provide a practicable method of service. In the second place, Thomason asks a court of equity, after final decree and four years after return of service, to act affirmatively and set aside its decree by quashing service without any showing whatever being made of meritorious defense or diligence, or any offer to come in and defend—and this in studied disregard of the time honored principle that equity will not enforce a mere naked technical right. In the third place, Thomason asks this affirmative action on mere motion, supported solely by the affidavits of himself and members of his family, without the safeguards of a hearing in open court, and further asks to have such affidavits outweigh the return of the marshal with all the presumptions of law and fact in its favor, together with the full and circumstantial affidavit of the deputy marshal, and this is asked although the chief family affidavits were made by Thomason, his daughter Meryle, and his daughter Rosamond. Meryle was charged, both in the cause itself and by affidavits filed in opposition to the motion to quash, with having conspired with

her husband and others to defraud plaintiff of its security by means of a fraudulent registration proceeding, and Thomason was in like manner charged with having conspired with his daughter Meryle, her husband and others, to make away with plaintiff's security, after the fraudulent decree of registration was obtained, together with the conversions and reconversions thereof. Yet in the face of these grave charges both Thomason and Meryle remained silent. Rosamond is involved in self contradictions. She first swore that the writ was delivered to her, and then that it was left on the front porch. Her version of what occurred between herself and the marshal can be true only on the hypothesis that the marshal was either a moron or a willful, reckless and gratuitous falsifier of his official return. In the fourth place, Thomason was within the territorial jurisdiction of the court at the time of service, and the return of the marshal is conclusive evidence under the authorities cited in our opening brief. Counsel for appellee do not cite a single authority dealing with the element of territoriality. In the fifth place, after Thomason had moved to quash the service on special appearance, and said motion had been submitted, he voluntarily filed affidavits and briefs in opposition to our *ex parte* motion to amend the return. This manifestly constituted a general appearance, and not a single one of the cases cited by appellee on the point is to the contrary. Not one of them holds that voluntarily coming in under such circumstances and offering evidence, as well as argument, on the merits of a proceeding not involved in

the motion on which special appearance was made, does not constitute a general appearance.

In view of the special pleading advented to above and inasmuch as the appeals grow out of one aspect of a case in which there were more than a score of defendants and many involved transactions, it will, we believe, lighten the labors of the court, and be in the interest of justice, if we make a short reply to the brief of appellee.

Reply to Matter Under Caption "Statement of Facts."

(Appellee's Brief, pp. 1-17.)

1. *The record shows that Thomason and his daughter Meryle were charged with and found guilty of grave frauds.*

After saying that "the action was brought primarily for the foreclosure of certain mortgages", and that "the amended pleading sought an accounting", counsel for appellee proceed to say:

"The words 'fraud' and 'conspiracy' are frequently used, but the foregoing is the essence of the proceeding." [App. Br., pp. 3-4.]

Counsel for appellee also indulge themselves in the following:

"Counsel, inveighing much against the character and alleged conduct of defendant Thomason and his relatives, seek by the frequent use of such phrases as 'gravest fraud,' 'steeped in fraud,' 'conspiracy,' 'dastardly crimes and frauds,' 'evading service,' and

the like, to divert the attention of this court from the real issues involved in the appeal, and, by indirection, to persuade this august tribunal to join in counsel's passionate disregard of the real facts disclosed by this record." (Id. p. 13.)

Brief reference to the record will show that the assertions quoted above are not justified, and if any one is attempting to "divert the attention of the court from the real issues involved in the appeal" it is the author of those assertions.

The original bill, after alleging that on October 2, 1917, and for a long time prior thereto, and at all times subsequent thereto, plaintiff, a foreign corporation not doing business in California, and with its principal place of business at Salt Lake City, Utah, was the holder of a note for the principal sum of $55,000.00 made by the defendant Austin, and secured by a trust deed on certain land in Imperial County, California, and the pledge of mortgages on certain other land in the same county, charges that Austin and others on the date mentioned "with intent and design to cheat and defraud the plaintiff out of its security" [Tr., p. 27] did cause a land registration proceeding to be brought for the purpose of registering title to the lands in question, free and clear of plaintiff's liens, without service of process on, or notice to plaintiff; and further charges that said registration proceeding was prosecuted to a successful conclusion. The fraud counted on is charged with great particularity. [Tr., pp. 27-79.] It was alleged to have consisted, in substance, of the fol-

lowing: (1) Intentionally omitting plaintiff herein as a party to the registration proceeding. (2) Filing in the court in which the proceeding was pending, a false affidavit of mailing of the petition for registration, and notice of application for registration, to the Delta Land & Water Company, the original holder of the $55,000. note (said affidavit having been made by Meryle T. Davis [Tr. p. 66]), together with a false affidavit of personal service of said petition and notice in the state of Utah, when in truth and fact no such mailing or service had been made, and the Delta Land & Water Company was in ignorance of said proceedings throughout their pendency. (3) Filing on the same day that the petition for registration was filed, and in the same court, an action to quiet title to the three parcels of land involved, in which action both the Delta Land & Water Company and plaintiff were named as parties defendant (plaintiff having been omitted as a party to the registration proceeding); and praying in said suit for registration under the Torrens law, and mailing, and personally serving in Utah, summons and complaint in said action on the Delta Company without procuring an order for substituted service therein (failure to procure such order rendering said mailing and service nugatory). (4) Obtaining the decree of registration without notice to plaintiff.

The amended supplemental bill first reviews the allegations of the original bill. [Tr., pp. 123-133.] Referring to the original defendants, it is alleged:

"That the several facts and circumstances and the fraudulent means and methods of the before mentioned defendants are set forth at length in the original bill of complaint herein, and are hereby referred to and made a part hereof with the same force and effect as if copied herein at this point." [Tr., pp. 131-132.]

It is then alleged:

"The plan or scheme to defraud the Delta Land & Water Company and procuring the fraudulent registration of the title to said lands as aforesaid, *was conceived by the defendant H. F. Davis,* and at all times herein mentioned said defendant H. F. Davis acted as the attorney and agent for the defendants Friend J. Austin and Lettie M. Austin, William Martin Belford and Annie Marie Belford, in the furtherance and execution of said plan or scheme.

"Said defendant Meryle T. Davis is, and at all times herein mentioned, was the wife of defendant H. F. Davis; that said defendant Jasper Thomason is and at all times herein mentioned was the father of said defendant Meryle T. Davis." [Tr., p. 133.]

The following allegation is made as to Thomason and certain others:

"That on or about December 13, 1917, at Los Angeles, California, *defendants H. F. Davis, Meryle T. Davis,* John W. Austin, Jessie Boyd Bilcher, John Doe *and Jasper Thomason conspired, confederated and agreed between themselves and each other to further said conspiracy,* to conceal said funds and assets and *to assist in the execution thereof."* [Tr., p. 134.]

It is then alleged that on the following day, which was *the day after the certificate of initial registration was issued, that title to all three parcels of land was conveyed of record to Thomason.* [Tr., p. 134.] The amended supplemental bill then details twenty-seven conveyances of record of the three parcels of land so registered, and the fruits and avails thereof within the next two years, all but two or three of them having been made after the filing of the original bill. As a result of some of these conveyances it is alleged that *Thomason* took title to property in Arizona and Imperial Valley, and acquired a mortgage on one of the parcels originally conveyed to him; that as late as May 5, 1919, this mortgage and the Arizona property were transferred of record to a third person in exchange for ranch property in Imperial County, California, title to which was taken of record in the name of *Meryle T. Davis;* that on May 7, 1918, another of the original parcels registered was exchanged by mesne conveyance for property in Orange County, California, title to which was transferred of record to *Meryle T. Davis;* that on December 11, 1919, both the Imperial County property and the Orange County property were transferred of record by *Meryle T. Davis,* the Orange County property to Messrs. Wilson & Edgar, and the Imperial County property to W. N. Boyer. [Tr., pp. 134-142.]

As to the two pieces of property thus transferred by *Meryle T. Davis,* it is alleged in the amended supplemental bill:

"That in *consideration of the transfers* to them as aforesaid said Francis R. Wilson, A. M. Wilson, Bertha Edgar and W. C. Edgar *paid to defendant H. F. Davis and Meryle T. Davis the sum of Seven thousand five hundred dollars ($7,500) in cash,* which the said defendants converted to their own uses and purposes and have not paid the same or any part thereof to plaintiff.

"That plaintiff is informed and believes and therefore alleges that *the transfer to said defendants Wade N. Boyer* and Leah A. Boyer, as aforesaid, *was without consideration and for the purpose of defrauding plaintiff and the other creditors of said defendants H. F. Davis and Meryle T. Davis.*" [Tr., p. 144.]

As to the twenty-seven conveyances before referred to, it is alleged:

"That the *aforesaid* judgments, orders, transfers, certificates, assignments and *conveyances and each of them, were made by the defendants and the other persons herein named and each of them with full knowledge of the rights of the plaintiff* under the aforesaid deed of trust and mortgages, and with full knowledge that said judgment of registration was procured by fraud as aforesaid, and *that all the other acts of defendants, and other persons herein named, and each of them, were taken pursuant to said conspiracies as aforesaid, and for the purpose of cheating and defrauding plaintiff of its security.*" [Tr., p. 143.]

In view of the foregoing, we submit that it is utterly absurd for counsel to deny that Thomason and members of his family were charged with grave frauds.

2. *The frauds charged against Thomason, his daughter Meryle, and his son-in-law Davis, were brought home to Thomason in the very proceeding under review on this appeal, and not having been denied in whole or part, destroy the credibility of Thomason and his family affiants.*

In the court below we filed affidavits in opposition to the motion to quash the return, and in said affidavits expressly referred to the allegations of the bill and amended supplemental bill. We also referred to some of the evidence taken at the trial as well as the fact that at the time of the trial Davis had fled to Mexico and Thomason was in hiding in the mountains of Kern County, and Thomason had evaded service of subpoena *ad testificandum*. Likewise, we referred to the fact that after hearing, the court had found that the frauds charged against Thomason, Davis, and Thomason's daughter Meryle, were true. (See our opening brief, pp. 13-14.) (Referring to the quotation on page 6 it should be observed that the expression "bill of complaint" as used in the decree is used to comprehend amended supplemental bill of complaint.) As already pointed out in our opening brief, and herein, neither Thomason nor Meryle T. Davis nor any one else denied any of these charges by affidavit or otherwise, and their counsel frustrated us in our endeavor to have the several family affiants called for cross-examination. What do counsel for appellee have to say to this in their brief?

First, counsel make this statement:

"The cold fact, which a sober examination of this record reveals, is that the district court never acquired any jurisdiction whatever over the defendant Thomason and that any adjudication of fraud or the like which is contained in the judgment and directed to the defendant Thomason is simply *coram non judice.*" (App. Br., p. 13.)

Again counsel say:

"For the purpose of the consideration of this appeal, he must be deemed entirely guiltless of any of the alleged wrongs." (Id. p. 13.)

Counsel also say:

"So far as Mrs. Davis is concerned, it appears from the face of the judgment [Tr., p. 228] that any finding of wrongdoing on her part was made in the absence of jurisdiction over her, or of her being represented as a party to the cause. We do not know what the merits of the judgment are with respect to Mr. Davis, but we do know that no man is to be condemned unheard because, perchance, he may have had a rascal for a son-in-law." (Id. p. 15.)

Counsel's final comment is that the evidence of plaintiff that Thomason dodged service of subpoena as a witness is not stated with sufficient particularity, and intimates that it is "speculation" and "pretense". (Id., pp. 13-14.)

The very question in issue on this appeal is whether the decree should have been set aside on the showing

made by the appellee, so we will not discuss the point on the basis of the binding force of the decree. But we submit that the detailed charges made in this very proceeding and in opposition to the motion of Thomason to set aside the return, called for answer, and in the absence thereof, must be taken as true, and as destroying the credibility of Thomason, his daughter Meryle, and the other members of his family.

In *Kirby v. Tallmadge,* 160 U. S. 379, the court said:

> "'All evidence', said Lord Mansfield in *Blatch v. Archer,* 1 Cowp. 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.' It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand, and given their version of the facts. *McDonough v. O'Neil,* 113 Mass., 92; *Com. v. Webster,* 5 Cush. 295, 316. It is said by Mr. Starkie, in his work on Evidence, (volume 1, p. 54: 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice." (Sup. Ct. Rep. 16, p. 350-351.)

In *Moore on Facts;* Section 574, it is said:

> "When conduct which is apparently suspicious or dishonorable is the subject of investigation, and the actor has an opportunity to explain it, and an interest in doing so, yet fails or refuses, it is but reasonable that the worst construction should be put upon it. The fair inference is that it is incapable of any explanation consistent with honesty and fair dealing. *Lord Stowell said he would indulge no tenderness for the character of a party who shows so little regard for it himself as not to repel an odious charge by every means in his power.*
>
> "In a trademark case where the plaintiff's evidence tended strongly to show that the defendants had adopted a colorable alteration of the plaintiff's trademark with intent to deceive, the court said: 'I would give thought that if the defendants had an honest explanation to give, one of them would have gone into the witness box and offered it. None of them has done so.' "

Our Code of Civil Procedure (section 1963) gives as a presumption:

> "5. That evidence wilfully suppressed would be adverse if produced."

In *Del Camp v. Camarillo,* 154 Cal. 647, 660, it was said:

> "Evidence withheld is presumed to be adverse."

In *Weis v. Parsons,* 144 Cal. 410, the court was called upon to deal with the proof of a negative. In the course of the opinion it was said in part:

"Moreover, the respondent herself endeavored to get before the trial court the want of any reasonable or plausible pretense for the said averments in the complaint in the former action, but appellant frustrated her efforts in that respect, while offering nothing himself on the subject. * * * It appears, therefore, that the respondent proved that said averments were, in fact, false; that she made reasonable efforts to show that appellant had no plausible grounds for said false averments, to which efforts appellants objected; and that appellant, having the ability to show whether or not the averments were wilfully false, simply stood mute. Considering these things, the court was warranted in finding that the false averments were wilfully false."

3. *Further observation on so-called "Statement of Facts."*

There is nothing else in the so-called "Statement of Facts" that merits extended discussion. With the exception of a few scattering points, all the other matters therein are covered in our opening brief or in the discussion of the authorities found below. Let us take up the scattering points summarily.

(a) It is argued that because the marshal struck the words "and Meryle T. Davis" from the return he "did not at that time conclude that he had served Mr. Thomason's married daughter Meryle T. Davis." (App. Br., p. 5.) It is not contended that the marshal knew that the name of Thomason's married daughter, whom he was serving, was Meryle T.

Davis. If he had known it he would, of course, have served her in her own capacity and not stricken her name from the return.

(b) It is insinuated by counsel that Mr. Lewinson falsely stated to the court during the trial that the marshal was in Seattle. (Appellee's Br., pp. 5-6.) It is pointed out in our opening brief that this insinuation is unwarranted. (Appellant's Br., p. 89.) It is also obviously uncalled for, because what Mr. Lewinson may have stated at the trial has precisely nothing to do with the motion to quash. But it is not entirely unexpected. In the court below, in their reply brief on the motion to quash, the same counsel when they apparently assumed there would be no opportunity to meet the insinuation, had the temerity to insinuate that Mr. Lewinson had prepared and filed the amended return himself, without any collaboration with the United States Marshal's office. [Tr., p. 184.] This insinuation is met by the affidavit of Mr. Walton, which was later filed by leave of court. [Tr., 274-279.] Counsel for appellee does not, of course, for a moment believe that Mr. Lewinson made a false statement to Judge Bledsoe, or any one else, and knows that if he had not frustrated the effort of appellant to have the motion to quash heard on oral testimony, all questions he had to put would have been fully and satisfactorily answered, and there would have been no room for innuendo and insinuations. Furthermore, if there be any conflict between the statement of Mr. Lewinson and the affidavit, it would be proper to reconcile it by holding

that the words "several days prior to October 4, 1923" in Walton's affidavit were used by inadvertance, and he meant to say "on or about."

We should not mention the matter at all save that throughout their so-called "Statement of Facts" counsel, by adroit use of language, go to the verge of making a number of other nasty insinuations about both Mr. Lewinson and the marshal that are utterly unwarranted, and will, we believe, meet with the reprobation they merit.

(c) It is claimed that Walton, the officer who served the process, was guilty of perjury because in an official return that he signed as deputy, he stated he had received the writ on May 9 and served the same on May 13, while in his affidavit he stated that three other deputies had attempted to make service prior to the time the writ was placed in his hands, the writ having been issued on May 9. (App. Br., pp. 14-15.) It is obvious that in the return the deputy spoke for the marshal rather than himself, and from the context of the affidavit it is plain that the reference to May 9 as the date when the affiant received the writ is a clerical misprision, because the context shows the service was made the same day affiant received the writ. It is also reasonable to assume that when the first amendment was made, which was after the deputy who made the amendment had gone out of office, the deputy was justified in making the return both in the ordinary way and by way of affidavit. [Tr., p. 217.] This first affidavit of Walton's is in

the very words of the first amended return except that it is verified. In making the first affidavit, therefore, the officer doubtless acted in a purely mechanical way without appreciating that there should be any difference in the content of the paper, and the first amended return.

These trivial lapses on the part of the officer, who offered to pick out in open court the person served, attest his veracity, and are in marked contrast to the eloquent silence of Thomason and his daughter Meryle, the convenient sickness of Thomason himself, and the self contradictions and ridiculous statements of Thomason's daughter Rosamond.

(d) Counsel's parting shot in the so-called "Statement of Facts" is that appellant should not blame Thomason for holding out for technical services, because that is what appellant, itself, did in the registration case. (Appellee's Br., pp. 15-17.) It is not too much to say the comparison is absurd. There was no attempt, whatever, at service in the registration proceeding, either upon plaintiff or its assignor by mesne conveyances, the Delta Land & Water Company. The proceeding in which the fraudulent service was made was the quiet title proceeding, which was used by Davis and his associates to throw plaintiff off its guard, and which never went to judgment, and was dismissed. Furthermore, in the quiet title proceeding it was not a question of technical service at all. There having been no order for publication, the pretended service was absolutely void of *record,* and it not even

being pretended that it had been made upon plaintiff, plaintiff certainly was not called upon to take any steps in the case.

REPLY TO APPELLEE'S POINT I. (pp. 25-51 of Appellee's Brief in Answer to Our Point I A).

The Return Was Complete and Self-supporting.

(Reply to Appellee's Brief, pp. 25-30.)

Appellee contends that we are in error in relying upon the last amended return. The two orders appealed from, the first of which quashed the service, and the second of which refused to set aside the first, were made May 25, 1925, [Tr. 320-322], and July 9, 1925, [Tr. 333], respectively. The order allowing the return to be amended and filed *nunc pro tunc* was made May 22, 1925, [Tr. 318-319]. It will thus be seen that the order quashing service was made after the order allowing the amendment of the return.

The fact that the amended return was not in existence at the time the motion to quash was made is immaterial. The amendment may be made on the hearing of a motion to vacate (*Herman v. Santee,* 103 Cal. 519), and the amendment has a retroactive effect. (*Jones v. Gunn,* 149 Cal. 687; 18 *Ency. of Pleading and Practice,* 963).

So it is the return as finally amended that we must consider.

The return of October 4, 1923, we believe, is also complete and self-supporting, but, however that may

be, it is the final amended return with which we are concerned.

The fact that Judge James might have denied the amendment is beside the point. He granted it, and the order stands unappealed from.

Appellee argues that Judge James found the amended return false before it was filed. There are three answers to this argument. The first is that it is untrue. It must be based on an implied finding by virtue of the order quashing service made May 25. But the order allowing the amendment was made May 22. The second answer is that since the amendment was retroactive, it is effective as of the date of the original service. (*Jones v. Gunn,* 149 Cal 687). The third is that it begs the question. The question under discussion is whether the return is conclusive, that is, whether the court had the right to consider the affidavits to overthrow the return. Therefore, even if Judge James made a finding based on the affidavits that the return was false, which we deny, such finding is beside the point on this question.

The final amended return and Equity Rule 13 are both quoted on page 42 of appellant's opening brief. On comparison it will be seen that the return shows full compliance with the rule, and is therefore complete and self-supporting.

But, says appellee, we must consider the affidavit of the marshal with the return, since it was made in support thereof, and it shows that the marshal did not know the name of the member of Thomason's family that he served.

There are three answers to this argument. (1) The affidavit of the marshal was not filed in support of the final amended return, but in support of the previous returns and the motion to amend them. [See Tr. 268]. Indeed it was filed before the amendment was allowed. [Tr. 279]. (2) The cases of the appellee cited on page 28 of his brief do not support the rule that affidavits will be considered in connection with a complete and self-supporting return, where there is territorial jurisdiction. The only case at all in point, *Fountain v. Detroit etc. Co.,* 210 Fed. 982, holds that an affidavit of the marshal may be used to support an *incomplete* and *defective* return. (See our original brief to the effect that the return stands alone and is conclusive.) (3) Even if the affidavit is considered and does show that the marshal did not know the name of the member of the family served, such fact is immaterial. The return need not name the member of the family to be complete. (*Robinson v. Miller,* 57 Miss. 237; *Vaule v. Miller,* 64 Minn. 485).

In *Robinson v. Miller,* the return showed service by leaving the writ with a member of the family who was not named. The court said at pp. 237 and 238:

> "On this service, a *pro confesso* was entered and a final decree rendered.
>
> "It is now objected that the service is defective, in that it does not give the name of the member of the family to whom the summons was delivered. We do not regard the objection as well taken."

Vaule v. Miller is to the same effect.

Cases Where There Was No Territorial Jurisdiction Are Not in Point.

(Reply to Appellee's Brief, pp. 30-32, pp. 36-37, pp. 42-44)

In our original brief we pointed out that cases involving non-residents not within the jurisdiction were on a different plane than cases involving residents within the jurisdiction. This must be so. The state has complete jurisdiction over the person of all its residents within its borders. It is only a question of bringing them before its tribunals. (*Story on Conflict of Laws* [8th Ed.] Sec. 540, pp. 754, 755; Sec. 547, p. 761; *Henderson v. Staniford,* 105 Mass. 504). On the other hand, the sovereign has no jurisdiction over non-residents not present within the jurisdiction. (*Pennoyer v. Neff,* 95 U. S. 714). Accordingly a personal judgment obtained by publication without personal service on a non-resident not present within the jurisdiction is void (*Pennoyer v. Neff*), but on a resident within the jurisdiction is valid. (21 *R. C. L.* 1292; *Ware v. Crockett,* 9 Cal. 107.)

To prove that there is no distinction appellee cites *Pennoyer v. Neff,* 95 U. S. 714, which holds that a judgment obtained on service by publication on a non-resident not within the state is void, *Mexican Central R. Co. v. Pinkney,* 149 U. S. 194, which was the case of a non-resident corporation not doing business in the state, and *Simon v. Southern Ry. Co.,* 236 U. S. 115, which was the same kind of a case, although the abstract in appellee's brief gives a different impression.

Obviously, these cases do not bear on the question of residents.

When it is a question whether the *sovereign* has acquired jurisdiction over the person, the court may go behind the face of the return. This was the case in *Mechanical Appliance Company v. Castleman,* 215 U. S. 437, in *Peper Automobile Co. v. American Motor Car etc. Co.,* 180 Fed. 245, and in *Higham v. Iowa, etc. Ass'n.,* 183 Fed. 845. When the sovereign has jurisdiction over the person, and it is a question of bringing the person before the court, and there is proof of service by the sworn officer of the court, complete and self-supporting on its face, the return is conclusive proof of the service. (See the many cases in our opening brief, p. 32.)

An additional reason for the distinction is that a non-resident defendant has the right to defend in his own court. It is not alone a question of his day in court, but a question of what court.

The Return Being Complete and Self-supporting on Its Face and Jurisdiction Over the Person by the Sovereign Being Conceded, the Return Was Conclusive.

(Reply to Appellee's Brief, pp. 30-51.)

Only two authorities on this point not considered in the opening brief are cited by appellee; *Harris v. Hardeman,* 14 How. 334, 14 L. Ed. 444, and *Freeman on Judgments.*

Harris v. Hardeman was a suit to quash a forthcoming bond and to set aside the default judgment on which it was based. The return showed substituted service, but *on its face* failed to comply with either the statute or the rule of court. Accordingly, the judgment was found to be void on its face. Obviously this case is not in point because the return was not only not complete on its face, but affirmatively showed want of service.

By quoting parts of sections from *Freeman on Judgments* (5th Ed.), appellee attempts to show that Freeman supports his position, but this is not the case. This will readily appear upon a little consideration.

As to *Freeman, Vol. 1, Sec. 228, page 448* (pp. 35 and 36 of appellee's brief). At the end of the quotation is a note numbered 12. That note has in it the following sentence. *"But a showing of diligence is required."* (Italics ours.) Moreover, in the note will be found such cases as *Neitert v. Trentman,* 104 Ind. 390, 4 N. E. 306, *Shepherd v. Marvel,* 16 Ind. App. 417, 45 N. E. 526, and *Locke v. Locke,* 18 R. I. 716, 30 Atl. 422, all of which, as is pointed out in our opening brief, adopt the modified rule of conclusiveness. Thus appellee demonstrates that Freeman supports the modified rule, instead of the absolute rule of conclusiveness. We are content for the case to be reversed on Point I.B instead of Point I.A. Moreover, in the same sentence after the last word appellee quoted, the author goes on "though some authorities are to the contrary,

unless the return was induced or procured through the fraud of plaintiff."

As to *Freeman, Vol. 3, Sec. 1201, page 2494* (P. 36 of appellee's brief). The quotation shows on its face, and this is especially clear when read with the context and the cases cited, that a court of equity will refuse relief, where by a state *statute* the sheriff's return may be impeached on motion. Of course, we showed in our original brief that by express statute in some states, the sheriff's return may be impeached. Such statutes do not affect the practice of the national courts sitting in equity.

As to *Freeman, Vol. 3, Sec. 1229, page 2558* (pp. 49 and 50 of appellee's brief). Mr. Freeman takes the position that the remedy by an action for a false return against the marshal is not an adequate remedy.

Let us, however, quote from the same section the words which immediately precede appellee's quotation.

> *"The national courts have steadily maintained that relief could not be had in equity by showing that a return of process was false, unless it was procured to be made by the plaintiff with knowledge of its falsity* * * * [Citing *Walker v. Robins,* 14 How. (U. S.) 584, 14 L. Ed. 552] These views have been more recently reaffirmed in the same court, [citing *Knox County v. Harshman,* 133 U. S. 152, 33 L. Ed. 586] except where the determination of that fact rests upon matters independent of the truth of the return, as where service on a foreign corporation was made by serving the Secretary of State as its statutory

> agent but the corporation was not doing business within the state. [Citing *Simon v. Southern R. Co.,* 236 U. S. 115, 59 L. Ed. 492, relied on by appellee, which clearly shows that there is a distinction in the case of non-residents].
>
> "The rule announced by the federal courts has been accepted and enforced in a number of the state courts."

The section then continues with the part quoted by appellee.

It will thus be seen that the Supreme Court of the United States disagrees with Mr. Freeman on this point.

The action against the marshal may not always give an adequate remedy. In most cases it will. We pointed out in our opening brief that the rule of conclusiveness rests on a balancing of interests. Appellee resorts to the argument *ad hominem,* and says he could have no action against the marshal in this case. We see no reason, if the return is false, why he should not have an action on the bond of C. T. Walton, whose deputy W. S. Walton was, since the amendment is retroactive. If Thomason has no action, it is because he chose to resort to trickery and to gamble with the process of the court. If he lost, he should not be heard to complain. Moreover, what is there to show that Thomason has any ground for complaint? He has studiously avoided stating that he did not have full knowledge of the service and that the final decree is not in accordance with the law and the facts.

Referring now to two cases already discussed.

We have reexamined *Blythe v. Hinckley,* 84 Fed. 228, and we find: (a) That the return was not complete and self-supporting on its face. This appears from the statement of facts and from page 241 of the opinion; (b) The court did not set aside the whole decree, but only the decree on the cross-bill, and retained jurisdiction to go on with the case. This is quite clear, since the court decided that the decree on the cross-bill was only interlocutory. Florence Blythe Hinckley was also a party to other parts of the case. The motion was really to reopen the interlocutory decree on the cross-bill. This will clearly appear if the whole statement and opinion are read.

Nickerson v. Warren etc. Co., 223 Fed. 843 (D. C. E. D. Pa.) is cited by appellee and appellant. On examination it will be found to hold that a marshal's return may be impeached when it is not complete and self-supporting, and may not when it is complete and self-supporting. In the words of the court: "This modification implies the converse, that when the return is complete and self-supporting, the old rule still pertains."

Appellee says that some of the federal decisions are based on state law. We are content to apply the California law, which adopts the modified rule of conclusiveness. (See *Gregory v. Ford,* 14 Cal. 138, pp. 75-77 of our opening brief.)

Many of the cases cited by appellant under Point I.A are singularly ignored by appellee. They are directly in point and cannot be distinguished.

REPLY TO APPELLEE'S POINT II. (pp. 51-68 of Appellee's Brief, in Answer to Our Point I.B.)

Due Diligence Must Be Shown.

(Reply to Appellee's Brief, pp. 51-64.)

Appellee contends that appellant has failed to show Thomason's knowledge. The short answer is that the burden is on the party seeking to set aside the decree to establish lack of knowledge. (See *Massachusetts Benefit Life Ass'n. v. Lohmiller,* 74 Fed. 23 and other cases cited under Point I.B in our opening brief). Moreover, we believe the facts set forth on pages 63 and 64 of our opening brief and the additional facts set forth in our "Reply to Appellee's Statement of Facts" herein show clearly that Thomason did have knowledge.

The cases cited by appellee have all been distinguished in our opening brief. He says they show that knowledge is not notice. Of course it is not. Appellee continually assumes the question. We have not a case where the record shows no service. We have a decree based upon a return faultless on its face. That return is proof of service. But there was no service in fact, says appellee. We submit the court should answer: "The record shows there is. We are not interested in going off the record unless you show that you deserve equity. To show this you must prove due diligence, a meritorious defense, and a waiver of limitations." In other words, it is not a question of service or no service, but of evidence of service.

Appellee significantly disregards *Gregory v. Ford,* 14 Cal. 138, and other well reasoned decisions that we cited. He admits that the language of *Massachusetts Benefit Ass'n v. Lohmiller,* 74 Fed. 23 (C. C. A. 7th Cir.) is against him, but attempts to distinguish that case, and *Martin v. Gray,* 142 U. S. 236, as well, on the ground that they were suits in equity to set aside judgments at law. The decision in these cases is not based on any rule peculiar to equitable relief against judgments at law, but on the contrary as stated by the court in the *Lohmiller* case, upon the broad *"principle that equity will not enforce rights upon grounds which are wholly legal or technical."* (See our opening brief, page 74.) This doctrine is as ancient as the maxims that "equity will not do a vain thing" and "equity looks through the form to the substance", and is clearly applicable to the case at bar.

The principle of *Massachusetts etc. Ass'n. v. Lohmiller* was approved by this court in *Cowden v. Wild Goose Mining and Trading Co.,* 199 Fed. 561, 565.

The distinction between *Massachusetts Benefit etc. Ass'n. v. Lohmiller* and *National Metal Co. v. Greene Consolidated Co.,* 11 Ariz. 108, is that in the Arizona case the plaintiff which sought relief in equity against the judgment at law was a non-resident corporation not doing business in the state. Moreover, the complaint showed due diligence and a meritorious defense. If the Arizona case is in conflict with the *Massachusetts Benefit case* (which of course it is not), the *Massachusetts Benefit* case must control, since it was expressly approved by this court.

A Waiver of Limitations Is Necessary.

(Reply to Appellee's Brief, pp. 64-65.)

The only answer that appellee makes to this point is to say in one breath that the statute of limitations has not run, and in the next breath that if it has, it is because counsel for appellant have been stupid. Whether the statute has run in an equity case is always a question. But the court will not require the party holding the decree to gamble. The party seeking relief must waive. The court does not have to determine whether the statute has or has not run. Appellee cites cases in support of both contentions. That is enough to show it is doubtful. In *Massachusetts Benefit Life Ass'n. v. Lohmiller,* 74 Fed. 23 (C. C. A. 7th Cir.) the court said: "There is no suggestion in the bill of any waiver of the limitation, and, unless waiver were imposed by the court as a condition of interference, the right of action would *probably* be barred." (Italics ours.) No answer is made by appellee to this case and to others like it cited in our opening brief.

Defendant Must Show a Meritorious Defense Which He Offers to Interpose.

(Reply to Appellee's Brief, pp. 66-68)

To our argument and authorities on this point, appellee answers: This is the same as saying defendant must agree to make a general appearance if his special appearance is unsuccessful, citing in that behalf the case of the court in *Davidson Bros Marble Co. v. U. S.,* 213 U. S. 10.

The difficulty with the argument is its premise. The rule that defendant must show a meritorious defense does not prevent defendant from appearing specially and effectively raising any proper point. If the return is defective on its face, defendant can appear specially and set aside the decree. But the difficulty here is that defendant must ask the court to go off the record to set aside a final decree, valid proof of service showing on the face of the return. The only possible reason the court should do this is the injustice of denying a man a day in court. If the man does not want his day in court, and if he had it, would not have a meritorious defense, there is no reason to go behind the record.

There is nothing in the *Davidson* case to the contrary. It holds quite properly that a non-resident corporation not doing business in the district cannot be required to agree to enter a general appearance in order to raise the point. This is obviously sound. As was pointed out in opening brief, the defendant in such a case has not only the right to its day in court; it has the right to defend in its own court.

REPLY TO APPELLEE'S POINT III. (pp. 69-80 of Appellee's Brief in Answer to Our Point II.)

The Facts.

(Reply to Appellee's Brief, pp. 69-70, 73-74)

We shall not burden the court with a new discussion of the facts. A few matters deserve attention, however.

(1). As we have already shown, it is not essential that the marshal know the name of the member of the family served. (*Robinson v. Miller,* 57 Miss. 237; *Vaule v. Miller,* 64 Minn. 485.)

(2). The marshal's affidavit [Tr. 274-279] does not state that the woman served was Mrs. Davis. That was our deduction. If he had known it was Mrs. Davis, he would have served her personally as a defendant. Instead he crossed her name out of the subpoena directed to Thomason and herself. His affidavit is quite consistent with that. He says he served a married daughter, and could pick her out. He does not claim to know her name. From what the other two married daughters say, we are confident it was Mrs. Davis.

(3). The law as laid down in *Davant v. Carlton,* 53 Ga. 491, that the "strongest" evidence is necessary to overthrow the return is not answered.

The Court May Review the Facts Afresh.

(Reply to Appellee's Brief, pp. 71-73.)

Appellee cites two cases from the Eighth Circuit which hold that even in cases of written evidence only, the finding of the trial court is presumptively right. They are wrong on principle, for they disregard the reason for the rule, and are not the law in this circuit. *(United States v. Booth-Kelly Lumber Co.,* 203 Fed. 423). In that case this court said at p. 429:

> "The findings in the court below were made upon evidence which had been taken before an examiner, and not in open court, and they

are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witness."

An Oral Hearing Should Have Been Allowed.

(Reply to Appellee's Brief, pp. 75-76.)

We believe the court should not have gone off the face of the return. But certainly if the decree was to be set aside, it should be on the clearest kind of testimony. Family affidavits should not take the place of cross-examination.

Appellee cites six cases in opposition on page 75. They are all cases of foreign corporations appearing before judgment to establish that fact. That is not the case of setting aside a decree.

We do not believe that the requirement of the "strongest" evidence can be met without an oral hearing.

Service on the Married Daughter Was a Compliance With Rule 13.

(Reply to Appellee's Brief, pp. 76-80.)

Appellee contends that even if the married daughter was served, the service is ineffectual because she was not a resident at Thomason's home. She said she was at the time of service, [Tr. 278], and the marshal so returned. Her spontaneous and disinterested statement then was a part of the *res gestae,* and is better than her interested statement now.

REPLY TO APPELLEE'S POINT IV. (pp. 80-85 of Appellee's Brief in Answer to Our Point III.)

Despite appellee's contemptuous attitude toward this point, we have been fortunate in finding, since the filing of appellee's brief, a case in the Circuit Court of Appeals for the Eighth Circuit directly in point, which sustains our position. (*Evans v. Yost,* 255 Fed. 726.) In that case an alternative writ of mandamus issued from the federal district court to the county judge, who evaded service. An order was entered that service could be made by serving the writ on a member of the family of the judge over fifteen years of age. Service was so made, and the marshal returned that service was made on "Ruby Evans, a member of the family of J. S. Evans * * * over the age of 15 years." The statute of Missouri authorized service in this manner on summons, but no provision was made therein for a service of a writ of mandamus. On an attachment for contempt, the county judge raised the point of no proper service. The court held that Equity Rule 13, and not the state statute applied, and that Equity Rule 13 had been complied with. The court said at page 730:

> "As the court found that, owing to the willful acts of the respondents in the mandamus proceedings, by concealing themselves to evade service of process, the court below, for the purpose of preventing a failure of justice, prescribed for a service which is in effect the same as is authorized by the statutes of Missouri. Equity rule 13 (198 Fed. xxii, 115 C. C. A. xxii) authorizes such

> service of subpoenas in equity, even if there is not willful evasion of the service of process. Therefore, even if the state statutes had required a personal service, and none other, it would not be binding on the national courts.
>
> * * * * * * * *
>
> "It is not even claimed that he had no notice of the granting, issuance, and service of the writ in conformity with the order of the court.
>
> "In view of these facts, we are of the opinion that the order of the district court for the service of the writs was authorized by the laws of the United States, and the service was sufficient."

Moreover, there is the additional argument to those made in our opening brief that to adopt appellee's construction would give no effect to the word "person", and it is a familiar rule of statutory construction that every word in a statute must be given effect, if possible.

Furthermore, there is no answer to the argument on this point made in the opening brief. We showed clearly that "adult" meant "matured" when used as an adjective, and that one of its meanings when used as a noun was "a person of full age." In answer appellee quotes a number of definitions of the noun, but none of the adjective, which is the use here.

If it be sophistry to assume that the Supreme Court of the United States uses words with accuracy, or that in construing the rule formulated by that court meaning is to be given to both the adjective "adult" and the noun "person," then we are sophists.

Counsel argues that we admit we are wrong by saying that Rosamond accused the marshal of making a deliberately false return. One smiles. No doubt we are fatuous as counsel says, but not that fatuous. Rosamond, of course, when she made her affidavit was acting under her solicitor's advice. Her solicitor took the position that one of seventeen years of age was not an "adult person." Otherwise, he would not have made the motion. That being so, according to her information, she was accusing the marshal of making a deliberately false return. Moreover, if we are correct on this point, the other points are immaterial. In arguing them, therefore, it is on the assumption, for the purpose of the argument, that we are wrong on this point.

But, says appellee, there is no showing that Rosamond was an "adult person", even within our meaning. The return, he says, must show on its face a full compliance with the rule. So it does. The return, quoted in full on page 10 of our opening brief, states that service was made on an "adult person". It is axiomatic, as will be seen from all the cases cited in both briefs, that the person attacking a complete return must produce evidence to overthrow it. *Harris v. Hardeman* and *Blythe v. Hinckley* were both cases where the return was incomplete on its face. It seems hardly necessary to add that where the rule uses the words "adult person", a return stating that the person served was an "adult person" is complete in itself, whether "adult person" means "matured person" or "person of full age".

Moreover, there is evidence of Rosamond's maturity. She was over seventeen. This would seem enough, (*Evans v. Yost,* 255 Fed. 726). And a child of fourteen has been held a person "of suitable age and discretion." (21 R. C. L. 1281.)

The conversation of Rosamond with the marshal, as detailed by herself and the marshal, in the absence of countervailing evidence, and there is none, is sufficient to show she was a matured person. (In order that we may not again be accused of inconsistency, of course, we must assume for the purpose of this point that the appellee is correct in saying Rosamond was the one served. But we do not so admit except *arguendo.*)

REPLY TO APPELLEE'S POINT V. (pp. 85-110 of Appellees Brief in Answer to Our Point IV.)

There Was a General Appearance.

It would extend this brief to undue lengths to discuss anew the authorities on this point. All the authorities cited by appellee have been distinguished in our opening brief.

Appellee argues that the motion to amend was occasioned by the motion to quash. Again we admit it. But that does not make it the same motion. The fact remains it was a new motion, and appellee appealed to the court's discretion and argued the merits in an attempt to defeat it. The question is not why the motion was made, but what the motion was.

But appellee says he would have been in a bad fix if he had not opposed the motion. A dishonest marshal can always amend, and a good, honest defendant cannot oppose it. The court will not assume its officers will swear falsely. The danger is as great in an original return as in an amendment. And why should the marshal, who had no interest in the matter, falsify his return? Moreover, the amendment was granted, and yet the motion to quash was also granted. Besides the fact of exigency is immaterial, as the cases cited in our original brief show. Suppose while a motion to quash summons was pending, plaintiff applied for an injunction. Perhaps the injunction, if granted, would ruin defendant. Yet if he opposed it, no one would contend that he had not entered a general appearance. In such a case he must make up his mind, whether to be in or out of court, but as is pointed out in *Crawford v. Foster,* 84 Fed. 939 (C. C. A. 7th Cir.), he cannot be both. Furthermore, there was no exigency. If appellee was defeated on his motion to quash by the amendment, he could have made a new motion to quash the amended return.

Appellee did not deign to comment on *Crawford v. Foster,* or on *Wabash Western Railway v. Brow,* 164 U. S. 271, or on *Edgell v. Felder,* 84 Fed. 69 C. C. A. 5th Cir.). Like so many of the cases in our opening brief, they are treated with lofty silence.

The real difference between appellee and appellant is that appellee says a defendant's appearance or non-appearance should be judged by what he says; appellant says it should be judged by what he does.

S. P. Co. v. Arlington Heights Fruit Co., 191 Fed. 101, was decided on the ground that the attacks were all on jurisdiction, and is not an authority here, because here the appeal was to discretion. If the case stands for more, it proves that defendant can appeal to the merits, and still not make a general appearance. If this is the holding of the case (and we do not believe it is), it is not the law because it is in conflict with *Wabash Western Railway v. Brow,* 164 U. S. 271; *St. Louis etc. Railway Co. v. McBride,* 141 U. S. 127, and *Fitzgerald Const. Co. v. Fitzgerald,* 137 U. S. 98.

Conclusion.

In conclusion, we make bold to assert that this case is not without public importance. We submit that if the marshal is required and at his peril to determine whether a person served is of full legal age rather than of sufficient maturity to understand the nature of a writ, or if a decree can be set aside on mere formal affidavits, of the most perfunctory character, coming from polluted sources, then the very integrity of process is in danger.

For the reasons made to appear in this and our opening brief, it is respectfully submitted that the orders appealed from should be reversed with instructions to the court below to make its order denying appellee's motion to quash.

Wm. Story, Jr.,
Joseph L. Lewinson,
Laurence W. Beilenson,
Solicitors for Appellant.